Volume 69

50907

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. EXCELL WILLIAMS, Defendant-Appellant.	APPEAL FROM CIRCUIT COURT COOK COUNTY CRIMINAL DIVISION

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendant was found guilty of rape and sentenced to one to ten years in the penitentiary. He appeals.

On July 2, 1963, Mrs. Sophia Robinson, the complaining witness, owned an apartment building at 1821 South Lawndale Avenue in Chicago and occupied a two-room apartment on the first floor, consisting of a bedroom and a kitchen. Also on the first floor were two other apartments, one occupied by a family by the name of Woodson and the other vacant. All three apartments led onto a common hallway. The only access to Mrs. Robinson's apartment from the hallway was a door leading into her bedroom; a door leading to her kitchen from the hallway was always kept locked. All three apartments shared a common bathroom at the end of the hallway. Entrance into the first floor from the outside of the building was gained through a locked, frosted-glass door at the head of the hallway. There were lights on both the outside and the inside of the frosted-glass door. As one entered the common hallway, the first apartment was the Woodson apartment, the second belonged to Mrs. Robinson and the third door was the bathroom.

Defendant and his wife had rented an apartment from Mrs. Robinson prior to July 2, 1963, and on that date were living in the 1600 block of South Lawndale Avenue. While in residence in Mrs. Robinson's building, defendant and Mrs. Robinson saw each other every day and knew each other well.

Mrs. Robinson testified that on July 2, 1963, at about 5:30 A.M., she was awakened by her alarm and was lying in her bed before going to work. She had on "baby-doll" two-piece pajamas. Shortly after 5:30, the outside door bell rang and she put on her housecoat, went to the outside door and asked who it was.

In response to her inquiry the person outside the door answered "Bill." From the size and shape of the man and from the name given, Mrs. Robinson assumed it was her brother. Without asking any other questions she unlocked the door and opened it. Defendant was standing there with a knife, demanded Mrs. Robinson's money and threatened her with the knife. Defendant slowly backed Mrs. Robinson into her apartment, some 15 feet down the hall, maintaining a distance of two to three feet from Mrs. Robinson and continuing to threaten her with the knife. When they reached Mrs. Robinson's apartment door, defendant closed and locked it. Mrs. Robinson testified that defendant shoved her and she fell onto the bed which was situated some six inches from the door. Defendant threatened to rape her and to kill her. Mrs. Robinson stated that she began pleading with the defendant and begged him to allow her to write to her son and to pray; she testified that defendant was "over my body" and placed the knife under her throat. On cross-examination Mrs. Robinson testified that defendant began to choke her after she fell onto the bed and that she fell unconscious for a short period. She asked to be allowed to go to the bathroom, but defendant continued to brandish the knife and insisted that she use the garbage can in the kitchen instead of the bathroom in the common hallway.

Mrs. Robinson testified that, before she went into the kitchen, defendant forcibly removed her bathrobe by "pulling it and pushing it with the knife." While in the kitchen Mrs. Robinson attempted to escape through the kitchen window; defendant grabbed her and took her back into the bedroom, at all times holding the knife, whereupon

he forcibly engaged in the first act of intercourse. During the first act, Mrs. Robinson testified, defendant struck her several times with the knife. Defendant thereafter forcibly removed Mrs. Robinson's pajamas and engaged in the second act. Mrs. Robinson testified that she did not know where the knife was during the second act.

After the second act, Mrs. Robinson stated, she continued to struggle and attempted to unlock the door and go into the hallway. Defendant struck her, threatened to kill her and warned her not to call the police. Defendant left the bedroom, but remained in the apartment, and Mrs. Robinson went into the bathroom and locked the door. While in the bathroom, she was attempting to climb through the bathroom window when she heard the defendant leave her apartment. She ran back into her apartment, locked the door and called the police.

Mrs. Robinson testified that defendant had been in her apartment for a period of about two hours, that after the second act of intercourse she heard other people stirring in the building, that she never screamed nor called for help, and that she called the police about 7:45 A.M.

Chicago Police Officer Benes investigated the complaint. Mrs. Robinson stated to the officer that defendant entered her apartment about 5:30 A.M. and perpetrated the acts complained of. Mrs. Robinson identified the defendant by name.

Mrs. Robinson was taken to St. Anthony's Hospital and examined by a doctor. It was stipulated at the trial that, if the examining doctor were called, he would testify that he examined Mrs. Robinson and took a smear from her vaginal area, which smear showed positive results of sperm. At the trial Mrs. Robinson testified that she had a number of puncture wounds on her shoulder, back, side and leg, but that she did not complain of these wounds to the doctor at St. Anthony's for the reason that she did not know of them until after she

had returned home and was taking a bath. Mrs. Robinson also stated that she saw her family doctor on the day following the incident.

Defendant Williams testified in his own behalf and denied the acts charged by Mrs. Robinson. He stated that on July 2, 1963, about 3:00 o'clock in the morning, he, his wife and a friend of his wife were visiting various neighborhood taverns. They were joined by a Mr. Brown about 4:00 A.M. Between 4:30 and 5:00 A.M. defendant and Brown drove defendant's wife and her girl friend to defendant's apartment and left the two women there. At 5:00 A.M. Brown and defendant drove to the Casablanca tavern where defendant had a part-time job.

Defendant testified that Brown left the Casablanca shortly after they arrived, but that he remained until 5:20 or 5:25 A.M., at which time he left in the company of a Mrs. Watts, a friend of his who also worked there. Defendant stated that he and Mrs. Watts went directly to the Williams Restaurant for breakfast. They ate breakfast and left the restaurant at 6:20 or 6:25 A.M. They took a cab to Mrs. Watts' home where Mrs. Watts left the defendant, and the defendant continued home and arrived there about 6:30 A.M. He immediately went to bed and remained in his room until about noon.

Defendant further testified that Mrs. Robinson owed him money, that on numerous occasions he had intercourse with Mrs. Robinson but not on the morning in question, and that Mrs. Robinson had threatened to "get him."

The testimony of Mrs. Watts corroborated the testimony given by the defendant concerning the times and places they were allegedly together.

It was stipulated at the trial that, if called, the owner of the Williams Restaurant would testify that both defendant and Mrs. Watts were present in his restaurant at the times testified to by Mrs. Watts and defendant.

Mrs. Bertha Williams, wife of the defendant, testified that she, her girl friend, defendant, and a Mr. Brown were visiting taverns on the morning in question. Mrs. Williams and her girl friend were taken back to the defendant's home at approximately 4:30 A.M. and remained there. Defendant and Mr. Brown went out again. Mrs. Williams testified she heard defendant return home at approximately 6:45 A.M., but did not actually see him until 9:30 A.M. She further testified that after she heard defendant return home, she heard the door slam and defendant may have gone out again, but she was not certain.

Mrs. Williams' girl friend, Mrs. Johnson, corroborated the testimony of the defendant and his wife concerning the times and places that they were allegedly together on the morning in question.

At the close of the defendant's case, Officer Benes was again called to the stand as a rebuttal witness, and was allowed to testify, over objection of the defendant, that Mrs. Williams stated to him on the morning he interviewed her (the morning of the incident) that she had not "seen her husband since yesterday."

In cases involving a charge of rape, the testimony of the complaining witness must be either clear and convincing, or else corroborated by other evidence at the trial. People v. Szybeko, 24 Ill.2d 335, 339; People v. Reaves, 24 Ill.2d 380, 382.

Defendant maintains that a substantial doubt exists as to his guilt for the reason that the only evidence against him, namely the testimony of Mrs. Robinson, is neither clear and convincing, nor is corroborated by other independent facts. We disagree.

The testimony of Mrs. Robinson is challenged primarily on the ground that it is improbable. Defendant further states that it must be borne in mind that the complaining witness had a history of mental instability, and that she owed defendant money and had threatened to "get him."

As to the question of the improbability of the testimony, defendant argues that "no mature woman living in the City of Chicago would open a locked door at 5:30 in the morning to admit an unexpected and totally unknown caller without asking that caller to properly identify himself." Mrs. Robinson, however, explained that she had a brother named Bill, that the form of the man outside the frosted-glass door resembled her brother's physical features and that she assumed it was her brother. It is also pointed out that Mrs. Robinson made no outcry during the entire incident. This, however, does not cast serious doubt on the credulity of her story. It must be borne in mind that during the entire incident defendant brandished a knife and used it on several occasions. The law does not require an outcry where such would be a useless gesture or where the victim is being restrained by fear of violence. People v. Silva, 405 Ill. 158, 164. Mrs. Robinson attempted to escape on at least three occasions, the first two of which resulted in force being used by the defendant. Upon receiving the opportunity to effect her escape when she entered the bathroom, defendant left the premises. The police were immediately called and Mrs. Robinson stated to the investigating officer that she was raped by the defendant. While inconsistencies do appear in her testimony, none are of an outstanding nature, and the account given by her was basically the same on both direct examination and cross-examination. Her testimony on cross-examination, that defendant choked her and she fell unconscious, is consistent with her testimony on direct examination, that defendant was on top of her and threatened to kill her.

The testimony of Mrs. Robinson was not only clear and convincing, so as to satisfy the evidence requirements in rape cases, but was further corroborated by the testimony of the investigating officer, by her immediate complaint to the police of the incident, by her immediate

accusation that the defendant, by name, had committed the crime, and by the medical report of the examining doctor. Defendant cites the case of People v. Trobiani, 412 Ill. 235, as standing for the proposition that the State should have called additional witnesses to corroborate Mrs. Robinson's story. The Trobiani case,however, was reversed on grounds other than the lack of corroboratory evidence. As to the lack of corroboration, the court there says, (p. 240) that some of the many witnesses who appear to be in a position to corroborate the testimony of the prosecuting witness should be called to testify. It is not necessary that all potential witnesses be called to testify, and in the case at bar some of the corroborating witnesses were in fact called.

The fact that defendant denied any guilt in this matter and that several defense witnesses corroborated his alibi, does not of itself raise a reasonable doubt as to his guilt. As stated in People v. Reaves, 24 Ill.2d 380, at page 382: "It is the duty of the court in a bench trial to determine the credibility of the witnesses and the weight to be given to their testimony, and unless the evidence is so improbable or unsatisfactory as to leave a reasonable doubt of defendant's guilt, the finding of the court will not be disturbed." The question of the weight of the evidence is for the trier of fact, in this case the trial judge, who hears and sees the witnesses, and the trial judge is in a much better position to determine which of the witnesses is worthy of belief than is a court of review solely from an examination of the record. People v. Jenkins, 24 Ill.2d 208, 210. Defendant's testimony, that Mrs. Robinson threatened to "get him." must be viewed in this light. The question of Mrs. Robinson's history of instability bears only on her credibility, and it must be further considered that she had been discharged from the mental institution some seven years prior to the trial.

The cases cited by the defendant in support of his position

are inapposite on their facts. They all involve circumstances which cast a substantial doubt on the guilt of the respective defendants. See: People v. Szybeko, 24 Ill.2d 335, (actions of complaining witness not those of an innocent woman who had just been raped; defendant threatened with criminal prosecution if he did not pay damages; police not notified until a month after the incident); People v. Silva, 405 Ill. 158, (testimony of complaining witness involved too many unanswered questions and questionable actions); People v. Grudecki, 373 Ill. 536, (serious doubt raised by testimony of complaining witness); People v. Carruthers, 379 Ill. 388, (highly questionable circumstances due to such facts as the time element involved, substantially conflicting testimony of all witnesses, and location where the alleged incident occurred); People v. McKinzie, 18 Ill.2d 44, (testimony of prosecuting witness raised serious doubt that she did not consent to the act); People v. Scott, 407 Ill.301, (actions of prosecuting witness not those of a woman who had not consented); and People v. Faulisi, 25 Ill.2d 457, (all facts show consent was given.)

The final point raised by the defendant is that the trial court improperly allowed Officer Benes to testify in rebuttal of the testimony given by Mrs. Williams. Officer Benes stated that Mrs. Williams told him on the morning of the incident that she had not seen defendant "since yesterday." Defendant maintains that Mrs. Williams was not confronted with the statement prior to the rebuttal testimony so as to have an opportunity to either deny having made the statement or to explain it. While it was improper to have allowed the officer to testify without first confronting Mrs. Williams with the statement, it was not prejudicial. The rebuttal testimony of the officer related only to the credibility of Mrs. Williams and in no way tended to establish the truth of the statement. People v. Moses, 11 Ill.2d 84, 87. The time period covered by Mrs. Williams' alleged statement

was merely cumulative of the testimony given by other witnesses covering the same period. Furthermore, defendant's guilt was established by affirmative evidence. No prejudice resulted from the allowance of Officer Benes' testimony in rebuttal.

The judgment is affirmed.

JUDGMENT AFFIRMED.

BRYANT, P.J., and LYONS, J., concur.

49956

PENN PROVISION COMPANY, Plaintiff-Appellee, v. RALPH E. WESTERFELD, d/b/a WESTERFELD'S MARKET, Defendant-Appellant.	)	APPEAL FROM THE MUNICIPAL COURT OF CHICAGO, FIRST MUNICIPAL DISTRICT OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS.

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT:

This is an appeal from a judgment entered in favor of plaintiff, in an action brought to recover damages on an alleged breach of contract by defendant.

Plaintiff was a wholesale meat company and sold meat to defendant, a retail meat merchant. On February 1, 1960, defendant being in a failing financial condition, and owing plaintiff Seven Hundred Four Dollars ($704.00), sent to all its creditors a letter and consent form. This letter offered a 40% dividend in lieu of defendant's availing himself of bankruptcy. Subsequently, a check was sent to plaintiff, in the sum of Four Hundred Sixty-Two Dollars ($462.00), signed by Louis Kessler, a partner in the firm of Collen and Kessler. The check bore a condition on the reverse side which referred to the letter of February 1, 1960 and was conditioned to acceptance of the terms in that letter. Plaintiff, without formally signing the consent, struck the legend, negotiated the check, and appropriated the funds to its benefit. Plaintiff admitted that its agents had knowledge of defendant's failing condition at the time it accepted and negotiated the check.

Defendant's theory of the case is that the court, upon the evidence presented, should have found that an accord and satisfaction of plaintiff's open account claim came into being through the admitted conduct of the parties.

At the outset defendant has appeared in this court and has complied with all the statutory requirements and rules of this court.

Plaintiff, however, has failed to file a brief or appear on oral argument. Under such circumstances the judgment may be reversed without a consideration of the cause on its merits. Eichelberger v. Robinson, 233 Ill. App. 579 (1924); C.I.T. Corporation v. Blackwell, 281 Ill. App. 504 (1935); 541 Briar Place Corporation v. Harman, 46 Ill. App.2d 1, 196 N.E.2d 498 (1964); Ogradney v. Richard J. Daley, Mayor, 60 Ill. App.2d 82, 208 N.E.2d 323 (1965); Oak Park National Bank v. Montanelli, No. M-50395, filed January 27, 1966; Mutual v. Nelson, No. 50732, filed February 18, 1966.

Furthermore, an examination of the law applicable to defendant's position reveals that defendant's contention on the merits of this case, is correct. The judgment is reversed and cause remanded with directions to enter judgment for defendant and against plaintiff.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

BRYANT, P.J., and BURKE, J., concur.

No. 65 - 141 Abstract

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ARNOLD N. MAY BUILDERS, INC., an Illinois Corporation,	)	
Plaintiff--Appellee,	)	
v.	)	Appeal from Circuit Court, Lake County, Illinois.
ELAINE PADJEN,	)	
Defendant--Appellant.	)	

MR. JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT:

This is an appeal from a judgment of the Circuit Court of Lake County entered May 28, 1965, awarding plaintiff-appellee a mechanic's lien for the sum of $6401.50 against property owned by defendant-appellant and providing that the property be sold in accordance with the law if that sum was not paid within five days.

On July 20, 1962, Arnold N. May Builders, Inc., hereinafter called the plaintiff, entered into an oral agreement with Elaine Padjen, hereinafter called defendant, to construct an addition to her home to be used as a commercial kitchen and to renovate certain rooms in the home itself. While there appears to be some dispute as to the agreed consideration for this work, it did progress on a so-called "time and material" basis whereby plaintiff charged for the material used at his costs; for labor on the basis of hourly wages paid to his employees or sub-contractors; and an additional

amount for overhead and profit. Plaintiff computed the total of these amounts to be $13,919.00 and claimed a lien in the amount of $6400.19, after allowing credit for several payments from the owner. The defendant argued that the charges were unreasonable and excessive; that it had been agreed that the total billing would not exceed $8500.00; that the work was done in a careless and unworkmanlike manner, and that as a result, she was damaged in the amount of $2000.00, which sum she demanded by way of counter-claim.

The matter proceeded to trial without a jury and at its conclusion the court ruled, as indicated, in favor of the plaintiff in the amount of $6401.50, after allowing a set-off from the original claim to cover certain items involved in the counter-claim. The sole issue raised on the appeal is the admissibility of certain profferred evidence from an "expert witness" testifying on behalf of the defendant.

The expert witness was one Clarence Tucker, a construction superintendent and estimator for Haglund, Inc., a general contracting firm. Mr. Tucker testified that he had been in construction work for thirty years, serving as building superintendent for various companies prior to his present employment.

At the outset of his testimony, Tucker stated that he had carefully examined the blueprints for the new addition which had been prepared and used by the plaintiff and admitted into evidence as one of plaintiff's exhibits. He also physically visited and inspected the property, with the aid of the blueprints, on two occasions prior to the trial. Counsel for the defendant then asked him:

> "Based upon your experience and examination of the blueprints and your inspection of the property, did you form an opinion as to the fair and reasonable cost of constructing that particular property, basing your figures on or about July or August of 1962?"

An objection was made by the plaintiff that there was insufficient foundation on which to base the opinion. The objection was sustained.

Tucker then proceeded to estimate the costs of the numerous parts that went into the kitchen addition, such as masonry, concrete work, carpentry, heating, painting and other specific items. He based his estimates on the unit cost of each item, including both material and labor, provided in the blueprints, and his own experience as an expert in that business. On cross examination, it was brought out that some of the estimated costs were determined by Tucker from information furnished to him by sub-contractors. It was also established that he had never worked in the electrical, painting, excavating, or plumbing businesses. At the conclusion of Tucker's breakdown of the costs of the individual items, and his cross examination, the court again sustained an objection to a question asking for his opinion as to the fair and reasonable cost of the total construction and refused to admit his written estimates into evidence.

The defendant contends that the trial court committed error in not permitting Tucker to testify as to the fair and reasonable costs of the total construction and in refusing to admit his written estimates into evidence. It appears from the testimony of Tucker that his opinion as to the fair and reasonable cost of the total construction and his written estimate were in part based upon estimates of other tradesmen, including the plumbing, electrical and heating installations. His oral testimony on the estimates for masonry, face brick, carpentry and building materials was allowed into

evidence by the court. Since it was necessary for Tucker to obtain estimates from subcontractors relative to the costs of certain items furnished, we believe that this is an admission that he was not qualified to give a total estimate of the fair and reasonable cost of construction, orally or in writing. Whether or not the particular witness qualifies as an expert is largely left to the discretion of the trial court. Garrett v. S. N. Nielsen Co., 49 Ill. App. 2d 422, 434; Park Dist. of Highland Park v. Becker, 60 Ill. App. 2d 463, 469. Under the circumstances the qualifications of Tucker to state an opinion as to the reasonable cost of the entire job was open to considerable doubt. We are of the opinion that the trial court did not abuse its discretion in refusing to admit this testimony.

Another witness testified for the defendant and was permitted to give his opinion as to costs of each of the various components involved in the construction. The testimony of Tucker was therefore only cumulative.

The defendant urges that if Tucker's testimony had been admitted the trial court may well have held in favor of the defendant and for this reason the cause should be reversed and remanded for a new trial. In view of our ruling sustaining the trial court we are not called upon to pass upon this question.

The judgment of the trial court will therefore be affirmed.

AFFIRMED.

MORAN, P. J. and DAVIS, J. concur.

50696

DR. JOHN T. REYNOLDS, DR. VERNON L. GUYNN and DR. ROBERT OVERSTREET, Plaintiffs-Appellees, v. SAMUEL R. STEPHENS, Defendant-Appellant.	Appeal from the Municipal Court of Chicago, First Municipal District of the Circuit Court of Cook County.

MR. JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT.

A judgment for $445.00 and costs was entered against the defendant in an ex parte trial on April 6, 1965. The defendant's attorney had notified opposing counsel the day before by telephone that he could not be present in court the next morning because he had to act as a pallbearer for a close friend. A formal notice was also served. On the morning of the trial he was represented by another attorney who explained the situation to the court and presented the defendant's verified motion for a continuance. The court disallowed the motion and directed the plaintiffs' attorney to proceed with his testimony. The judgment followed.

A motion to vacate the judgment was filed within 30 days and was heard on May 6, 1965. The motion explained the circumstances under which the judgment was entered. The court, upon ascertaining that the plaintiffs' attorney had received notices of the requested postponement the day before the ex parte trial, vacated the judgment. The case was set for trial on May 26th and later, at the request of the plaintiffs, was reset for June 10, 1965.

On May 18th the plaintiffs moved to set aside the order of May 6th and to continue the defendant's motion to vacate until June 10th or, in the alternative, to set aside the order of May 6th and to open the judgment and have the judgment stand

as security until the case could be heard. The reason given for the motion was that a garnishment action had been filed by the plaintiffs prior to May 6th and that granting their motion would preserve the garnishment proceedings.

The trial court first said that the case would be heard on June 10th as previously ordered but then, without explanation, entered an order not requested by the plaintiffs. The order of May 6th was vacated and the original judgment of April 6th was allowed to stand without qualification.

The defendant's appeal is on the ground that the court acted arbitrarily and abused its discretion in entering the order that it did. The plaintiffs have not opposed the appeal. They have filed no brief in this court and because of this the defendant's prayer for reversal may be allowed without further consideration of the case. Ogradney v. Richard J. Daley, Mayor, as Local Liquor Control Com., et al., 60 Ill. App. 2d 82, 208 N.E.2d 323 (1965); 541 Briar Place v. Harman, 46 Ill. App. 2d 1, 196 N.E.2d 498 (1964).

In circumstances such as these we may in our discretion examine the record to see if an injustice would be done if a reversal were ordered. We have done that in this case and we find no reason in the record that would cause us to proceed further. The judgment is reversed.

Reversed.

Sullivan, P.J., and Schwartz, J., concur.

Publish in full.

April 18, 1966

NO. 65-136

Abstract

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

JOHN G. PLAIN,	)	
	)	
Plaintiff-Appellant,	)	Appeal from the
	)	Circuit Court for
vs.	)	the Sixteenth
	)	Judicial Circuit,
RUTH R. PLAIN and WM. WALSH,	)	Kane County.
	)	
Defendants-Appellees.	)	

MR. PRESIDING JUSTICE MORAN DELIVERED THE OPINION OF THE COURT:

The plaintiff and Ruth R. Plain, the principal defendant, are husband and wife. They own the premises in question as joint tenants and both occupy the premises as their residence. The other defendant, one Wm. Walsh, is the holder of a Certificate of Tax Sale on the premises. All parties agree that the certificate constitutes a first lien on the premises and no issue is raised in connection with the interest of Walsh.

The plaintiff filed this suit for partition alleging that he and the principal defendant each own an undivided one-half interest in the premises

subject only to the interest of Walsh.

Mrs. Plain countered the complaint with a motion to dismiss alleging that she and her husband had various marital problems; that he refused to support her and that he wanted a divorce. She concluded that this action was brought to force a divorce and that as a result the plaintiff came into equity with unclean hands.

The trial court found that a problem of homestead existed and further that the defendant had raised sufficient special equities by her motion. As a result, the case was dismissed and this appeal followed.

The trial judge saw some difficulty with the proposition that a husband can sell his wife out of the family home. We find the same difficulty. However, the law is clear and we are bound by it. The remedy, if any, for this type of situation lies with the Legislature, not the courts.

In the case of LaPlaca v LaPlaca, 5 Ill. 468 (1955), the Supreme Court considered an identical question involving homestead. At page 471, the Court said:

> "Essentially the Homestead Act provides the householder an exemption from the claims of third parties. While it contemplates that upon the death of her husband or his desertion of her the wife may succeed to the exemption which the statute gives him, and while it makes her consent necessary to a release of the homestead, it does not otherwise create a present right in her to a $1000 interest in his property. The Partition Act does not enlarge her rights. It provides for a monetary award equivalent to the homestead exemption, but the right to the award is made contingent upon whether the claimant under the circumstances is the one who is entitled to that exemption."

The Court went on to hold that where a husband and wife, who jointly own and live together in their property, the husband is the householder contemplated by the statute and

he is the one entitled to the exemption. In the LaPlaca case, the Court approved the equal division of the property which in effect divided the homestead exemption. In the case at bar, the plaintiff seeks to divide the property which in effect will divide the homestead exemption. There is no homestead problem in this case under the applicable law.

The defendant next contends that the plaintiff does not come into equity with clean hands and that his complaint violates public policy. In Heldt v Heldt, 29 Ill. 2d 61, 63 (1963), the Supreme Court held "in the absence of special equities one owning land in common with another, such as a tenant in common or a joint tenant, has an absolute right to partition." In that case the defendant challenged the right to partition on the grounds that the plaintiff had been guilty of infidelity and was trying to force the defendant to give her a divorce. The Supreme Court, at page 64, rejected this contention and held that the "motive for partition is immaterial (Citations Omitted),and that the absolute right to partition yields to no consideration of hardship, inconvenience or difficulty."

We find in accordance with applicable law that no special equities exist on behalf of the defendant and that the plaintiff has an absolute right to partition the premises.

The trial court was incorrect in dismissing the complaint. The decision is hereby reversed and remanded with instructions to proceed in accordance with this opinion.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Abrahamson, J. and Davis, J., concur.

NO. 65-97

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. S. J. EMBERY, Defendant-Appellant.	Appeal from the Circuit Court of the Twentieth Judicial Circuit, St. Clair County, Illinois Honorable Quinten Spivey, Judge Presiding.

Goldenhersh, P. J.

Defendant, S. J. Embery, was tried by jury in the Circuit Court of St. Clair County and convicted of the crime of Armed Robbery. (Ch. 38, sec. 18-2, Ill. Rev. Stat. 1963) He was sentenced to the penitentiary for a term of not less than 3 nor more than 15 years. The Supreme Court issued a writ of error, appointed counsel for defendant, and on motion of The People transferred the cause to this court. The nature of the grounds for reversal argued in defendant's brief make it necessary to review the evidence.

At approximately 8:00 P. M. on January 1, 1963,

three masked men entered a tavern located near 5th and Illinois Streets in East St. Louis and robbed two customers sitting at the bar. At least one of the robbers was armed with a revolver. One of the customers grabbed a gun which was kept under the bar and the robbers ran out. The customer with the gun, and another customer, ran to the door and fired at a red and white car which the departing robbers had entered. No one in the tavern could identify any of the men who had committed the crime.

Later that evening the East St. Louis police found a red and white car behind a filling station, approximately 15 blocks from the tavern. One tire was flat, and there were two bullet holes on the right hand side of the car. The police found an empty wallet on the seat of the car which was identified as having been taken during the robbery. Its owner testified that when it was taken, it contained $20.00.

Defendant and three other men were jointly charged with the offense. At the time of trial one defendant had not been apprehended. Two defendants pleaded guilty and at the time of trial were awaiting sentence. One of the defendants who pleaded guilty, Ernest Foy, aged 17, testified that on January 1, 1963, he, the defendant in this case, and the other two defendants, Arthur Lee

and Edward Madison, were joy riding in a red and white car driven by defendant. There had been some discussion between Foy and Arthur Lee, one of the defendants, about making some money. They had driven out to about 5000 on State Street in East St. Louis, and then drove back to 5th and Illinois Avenue. Foy, Lee and Madison left the car and defendant said he would park the car in back of the tavern. Lee had a gun which was not loaded. Foy, Lee and Madison entered the tavern. Foy testified he did not know there was a robbery committed, that they left the tavern quickly because some one was shooting at them. Foy and Madison ran to the rear of the tavern and as Foy was getting into the car he was shot, the bullet striking his arm. Defendant asked what happened and Foy told him to get moving. They drove the car to where it was abandoned, hailed a passing taxi cab, Foy stopped at the home of a friend where his arm was bandaged.

Some time later a police officer investigating the crime went to an apartment on Market Street in East St. Louis to talk to defendant. Whether this was on the same evening or at some later time is not clear from this record. He was admitted to the apartment by a woman with whom the officer testified, defendant was living. The woman admitted him to the apartment where the officer found the coat which Foy was wearing when he was shot,

and a small caliber revolver.

Defendant contends that the only evidence which in any way connects him with the crime is the uncorroborated testimony of Foy, who had pleaded guilty to the robbery charged and was awaiting a hearing on a petition for probation. As to this contention, the Supreme Court has held that a conviction can be sustained by the uncorroborated testimony of an accomplice if the trier of fact is convinced of guilt beyond a reasonable doubt. The People vs. Palmer, 26 Ill. 2d 464. The jury was properly instructed as to the care and caution with which the testimony of an accomplice must be considered, and we cannot say that the proof was so unsatisfactory as to justify a reasonable doubt of defendant's guilt.

Defendant contends that there is no evidence which tends to prove that he knew that the defendants intended to commit a crime, and tends rather to show that he was justified in thinking that the other defendants entered the tavern for the purpose of purchasing beer. A similar contention was considered by the Supreme Court in The People vs. Washington, 26 Ill. 2d 207. In the light of that decision, we are of the opinion that defendant's conduct in driving the car to the back of the tavern, the abandonment of the car after the occurence, and the

fact that the coat worn by Foy was found in his apartment tend to justify the conclusion that defendant joined with the other defendants in a common purpose of committing the robbery.

Defendant contends further that the gun and coat, having been taken without a search warrant, should not have been admitted into evidence. The testimony shows that when the police officer went to the apartment, a woman admitted him and permitted him to take the coat and gun. The officer testified that he did not know whether it was the woman's apartment, or the defendant's, that the defendant was there at the time, in bed, that the officer told him to dress, that he wanted to talk to him.

Insofar as may be determined from this record, defendant and the woman with whom the officer talked had equal rights to the use and occupancy of the apartment from which the coat and gun were taken. The Supreme Court has held that where two persons have equal rights to the use or occupancy of premises, "either may give consent to a search and the evidence thus disclosed can be used against either". The People vs. Palmer, 26 Ill. 2d 464.

In his opening statement, the Assistant State's Attorney, after describing in general terms what occured

inside the tavern, told the jury that a man was waiting in the get away car, in the alley behind the tavern, and further stated "There won't be any question about it, because we have a statement verifying this, and we have a witness." Defendant argues that this clearly left the implication that the reference was to a statement made by defendant, the remark by the Assistant State's Attorney was improper, prejudicial to defendant, and reversible error.

Applying to this contention the test set forth in The People vs. Allen, 17 Ill. 2d 55, we cannot say that this remark was such as to give reasonable grounds for believing that the jury was prejudiced, and the verdict affected thereby.

The court commends appointed counsel for the able presentation of the errors relied upon.

The judgment of the Circuit Court of St. Clair County is affirmed.

Judgment Affirmed.

Concur: Hon. George J. Moran, J.

Concur: Hon. Edward C. Eberspacher, J.

PUBLISH ABSTRACT ONLY.

April 26, '66 2280

NO. 65-92.

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

ACME EXCAVATING COMPANY, an Illinois Corporation, Plaintiff-Appellant, vs. STATE BANK OF BREESE, a corporation, Defendant-Appellee, and JOHN A. KETZNER, Defendant.	Appeal from the Circuit Court of Clinton County. Honorable Bill Slater, Presiding Judge.

Goldenhersh, P. J.

Plaintiff appeals from the judgment of the Circuit Court of Clinton County in favor of defendant, State Bank of Breese, entered after a trial before the court, without a jury. To properly present the issues raised in the appeal, it is necessary to review the pleadings and evidence.

The complaint, as amended, alleges that plaintiff had funds on deposit with defendant, State Bank

of Breese, hereinafter referred to as the bank, that defendant, Ketzner, hereinafter referred to as Ketzner, was employed by plaintiff and authorized to issue checks on plaintiff's account, but was not at any time an officer of plaintiff, that on April 8, 1959, plaintiff issued a check payable to the defendant bank and obtained in exchange therefor a cashier's check payable to Acme Excavating Co., John A. Ketzner, Pres., that plaintiff's check bore the indorsement intended as instructions to the bank "for a cashier's check payable to the company" that on April 11, 1959 plaintiff through Harley Dietz, its president, notified defendant bank that Ketzner was not president of plaintiff and if the cashier's check was endorsed by Ketzner as president "it would necessarily be a forgery", that it orally requested the bank to stop payment on the cashier's check and later the same day gave it written notice to stop payment, that plaintiff offered to furnish a bond to defendant bank to indemnify it against any claim against it resulting from its stopping payment of the cashier's check, that the bank nevertheless wrongfully paid the cashier's check when it was presented. The amended complaint contains other allegations not here material and prays judgment against both defendants.

Both defendants answered the amended complaint admitting the issuance of the cashier's check and denying the other allegations therein contained.

The evidence shows that defendant Ketzner had paid plaintiff, through Harley Dietz, the sum of $5,000.00 for which he expected to receive shares of the stock of plaintiff corporation. He entered plaintiff's employ and worked under the supervision and direction of Dietz. Plaintiff had a checking account with defendant bank and according to the signature card offered and admitted in evidence, funds could be withdrawn on the signature of either Dietz or Ketzner. There is no designation on the signature card of the corporate position or office of either signator.

On April 8, 1959 , Dietz instructed Ketzner to obtain from defendant bank a cashier's check payable to plaintiff and deposit it to the credit of plaintiff at the Gravois Bank in St. Louis, Missouri. Ketzner obtained the cashier's check payable as above described, but instead of depositing it to plaintiff's credit at the Gravois Bank, he deposited it to his own account in a bank in Kirkwood, Missouri. On the following day he mailed to plaintiff a receipt showing the $6,000.00 to have been applied "on $7,050.00 due me on loan and salary to date.

Balance due me $1,050.00."

In its judgment order the court found that the defendant bank had no legal obligation to stop payment on the check, that the bank was not negligent in failing to stop payment on the check as requested by plaintiff, and that plaintiff was contributorily negligent in placing Ketzner in a position to obtain the cashier's check. The court entered judgment in favor of the defendant bank but entered no judgment on plaintiff's claim against Ketzner.

Plaintiff contends that the circuit court erred in entering judgment for the defendant bank and in its Points and Authorities states "Plaintiff relies upon the case of Paine v. Continental and Commercial National Bank, 259 Ill. App. 526". As to this contention, we hold that in the case before us, an endorsement of the cashier's check by Ketzner, although he may not have been president of plaintiff was not a forged endorsement and the case upon which plaintiff relies is not here controlling.

The transaction out of which this action arose transpired prior to the effective date of the Uniform Commercial Code and we must, therefore, look to the statutes in force at that time. Ch. 98, sec. 206, Ill. Rev. Stat. 1959 defines a check as a bill of exchange

drawn on a bank, payable on demand and makes applicable to checks the same statutes as are applicable to bills of exchange with certain exceptions. A bill of exchange is defined as follows:

> "A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to order or to bearer. Ch. 98, sec. 147, Ill. Rev. Stat. 1959.

In Madison and Kedzie State Bank v. Madison Square State Bank, 271 Ill. App. 12, the Appellate Court for the First District, at page 18, said: "The legal effect of a cashier's check issued by a bank is the same as a bill of exchange drawn by the bank upon itself and accepted in advance by the act of its issuance, and is not subject to countermand like any ordinary check." The trial court, therefore,correctly found for defendant on this issue.

Plaintiff contends that the court erred in failing to enter judgment in its favor against Ketzner, arguing that the evidence shows Ketzner wrongfully converted to his own use $6,000.00 of plaintiff's funds. Ketzner answered plaintiff's amended complaint and thereafter refused to come to Clinton County for deposition, basing

his refusal on the fact that plaintiff had appeared before a Grand Jury in Clinton County and an indictment had been voted charging him with embezzlement, and that he risked arrest by coming to Illinois. Plaintiff filed a petition and obtained the issuance of an order to compel Ketzner's appearance in Carlyle for the purpose of being deposed by counsel for plaintiff. Ketzner did not appear and on plaintiff's petition the circuit court issued an order to Ketzner to show cause why he should not be held in contempt for failure to comply with the order to appear for deposition, Ketzner again failed to appear and the court entered an order fining him $100.00 and further ordering "and shall be further refused permission to proceed with his defense or answer, until such time as he appears at trial for adverse examination." Subsequently Ketzner's deposition was taken in St. Louis, Missouri and the deposition recites that it was taken without notice upon stipulation of counsel. Whether the fine was paid or what further was done regarding the contempt order is not shown in the record.

At the trial of the case, Ketzner did not appear and was not represented by counsel. No motion was made for the entry of a default against Ketzner. Dietz, who testified he was president of plaintiff was asked by

the Court, referring to Ketzner:

"The Court: What does the company owe him. Any money at this time?

A. (Dietz) We do.

The Court: How much ?

A. (Dietz) I don't know until we get the books together."

This testimony would not support a judgment against Ketzner and in the absence of any motion for the entry of a default and the introduction of evidence showing Ketzner to be indebted to plaintiff, there was no basis for the entry of a judgment against Ketzner.

For the reasons herein set forth the judgment entered by the Circuit Court of Clinton County in favor of the defendant State Bank of Breese and against plaintiff, Acme Excavating Company is affirmed, and the cause is remanded to the Circuit Court of Clinton County for such further proceedings as may be required to adjudicate the action pending between plaintiff and defendant Ketzner.

Judgment affirmed and cause remanded with directions.

Concur:

Hon. Edward C. Eberspacher

Hon. George J. Moran

PUBLISH ABSTRACT ONLY

NO. 65-59

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ROBERT J. MALCOMSON, Plaintiff-Appellant, vs. REX BENNETT, Defendant-Appellee.	)	Appeal from the Circuit Court of the 18th Judicial Circuit of DuPage County, Illinois.

MR. PRESIDING JUSTICE MORAN DELIVERED THE OPINION OF THE COURT:

Plaintiff appeals from a judgment entered upon a directed verdict in defendant's favor at the close of plaintiff's case in chief.

The plaintiff severely injured certain of his fingers while operating a snow plowing machine furnished for his use by the defendant. The complaint charged that the plaintiff was in the exercise of due care and that the defendant, who was in the hardware business, provided the machine but failed to furnish available operating instructions and failed to warn the plaintiff of the dangerous characteristics of the machine. At the conclusion of the evidence offered by the plaintiff the trial court directed the jury to return a verdict finding the defendant not guilty. The trial judge found that the plaintiff was guilty of contributory negligence as a matter of law.

The plaintiff did not file a post-trial motion and the defendant moved to dismiss the appeal. The motion to dismiss was taken for consideration with the case.

Subsequent to the filing of the notice of appeal in this proceeding, the Appellate Court for the First District in Rzeszutko v Yellin, 61 Ill. App. 2d 164, 208 N. E. 2d 872, (1965), resolved this precise question. It was there held, after examining all the authorities which have been called to our attention here, that Section 68.1 (5) of the Civil Practice Act (Ill. Rev. Stats. Ch. 110) applies to this situation and precludes an appeal where the plaintiff fails to file a post trial motion after the granting of a directed verdict at the conclusion of plaintiff's case.

We have carefully reviewed the decisions interpreting the Civil Practice Act on this question and notwithstanding the ruling in Mann v Sanders, 29 Ill. App. 2d 291, 173 N.E. 2d 12 (3d Dist. 1961), (Abst.) we believe the better rule is that enunciated in Rzeszutko v Yellin, supra, for the reasons therein set forth. Accordingly, this appeal must be dismissed.

APPEAL DISMISSED.

Davis, J. and Abrahamson, J., concur

50194

PEOPLE OF THE STATE OF ILLINOIS, Appellee, v. CLARENCE MAYFIELD, Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, CRIMINAL DIVISION

MR. PRESIDING JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

This appeal comes from a judgment on a verdict of guilty of the crime of unlawful possession of narcotic drugs. The appellant claims the narcotics were seized pursuant to an invalid search warrant.

On September 24, 1963, Albert Jones, a police informer, swore to an affidavit for a search warrant, wherein he stated that he was in the first floor apartment at 4951 Forrestville, Chicago, on September 23, 1963, and bought heroin from Clarence Mayfield for $30.00. A search warrant was issued by a magistrate commanding a search of "the entire first floor apartment of the premises known as 4951 Forrestville, Chicago, Illinois being used and occupied by Clarence Mayfield." Jones also swore to an affidavit that on the same day he "was in the first floor apartment at 4759 St. Lawrence Avenue, Chicago, Illinois...and bought heroin from Clarence Mayfield for $30.00." A search warrant was also issued covering this address.

Inspectors for the Illinois Narcotic Control Division went to 4951 South Forrestville on September 24, and rang the doorbell which bore the name "Mayfield." As the door was opened, the inspectors announced that they were police and stepped inside the apartment. A copy of the search warrant was presented to Clarence Mayfield whereafter a search of the apartment was made and a quantity of heroin was found on a table in a bedroom and a quantity of marijuana was discovered in a purse also in the bedroom.

The appellant made a pretrial motion to quash the warrant and suppress the evidence. This motion was denied. In a trial before

a jury the appellant was found guilty and was sentenced to a period from five to ten years in the Illinois State Penitentiary.

The first point raised in this appeal is that the search warrant does not particularly describe the place to be searched. It is said the warrant states the place to be searched as "the entire first floor apartment of the premises known as 4951 S. Forrestville, Chicago, Illinois." The argument is made that this description includes the entire first floor, and since there were two apartments on the first floor, the warrant was unnecessarily broad. The difficulty with this argument is that the warrant states the place to be searched as the entire first floor apartment of the premises known as 4951 S. Forrestville, Chicago, Illinois being used and occupied by Clarence Mayfield. This warrant describes only one apartment and is not unnecessarily broad. As was said in United States v. Hinton, 219 F.2d 324 (1955) at page 326, "The basic requirement is that the officers who are commanded to search be able from the 'particular' description of the search warrant to identify the specific place for which there is probable cause to believe that a crime is being committed. This requirement may be satisfied by giving the address of the building and naming the person whose apartment is to be searched. Kenney v. United States, 81 U.S.App.D.C.259, 157 F.2d 442; Shore v. United States, 60 App.D.C. 137, 49 F.2d 519."

The next point raised on this appeal is that "the mere uncorroborated statement by an affiant that he was at a certain place on a certain date, and bought heroin from a certain party on that date, is not sufficient probable cause to believe that heroin is on those premises one day later."

In People v. Montgomery, 27 Ill.2d 404, 189 N.E.2d 327 (1963) it was held that there is no set time within which a complaint for a search warrant must be made. In that case there was a delay of eight

days. In the case at bar there was a delay of but one day. In People v. Dolgin, 415 Ill. 434, 114 N.E.2d 389 (1953) a delay of 49 days was held not to be unreasonable. We would be hard pressed to say that the delay of one day in this case was unreasonable.

The final point raised is that the affiant in an affidavit for a search warrant should be produced upon request where the circumstances clearly show that the search warrant was fraudulently procured. The appellant argues that since two affidavits were drawn alleging a sale of narcotics at two separate addresses on the same day, there is a possibility of fraud. Sec. 114-12 of the Code of Criminal Procedure of 1963, Chap. 38 Ill. Rev. Stat. 1963 sec. 114-12, states that "the burden of proving that the search and seizure were unlawful shall be on the defendant." Since the appellant admits that both the allegations of sale might be true we cannot see how any presumption of invalidity could arise so as to require the People to come forward with evidence. The appellant knew the identity of the informer and was able to call him as a witness. The People were under no obligation to produce this informer.

There was a motion taken with this case to transfer it to the Supreme Court because of the existence of substantial Constitutional issues. The motion is denied. For the reasons expressed in this opinion, the judgment is affirmed.

JUDGMENT AFFIRMED.

LYONS, J., and BURKE, J., concur.

50298

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	APPEAL FROM
	)	CIRCUIT COURT
vs.	)	
	)	COOK COUNTY
THOMAS JEFFERSON, Defendant-Appellant.	)	CRIMINAL DIVISION.

MR. JUSTICE McCORMICK DELIVERED THE OPINION OF THE COURT.

Thomas Jefferson was indicted, together with Vince F. Hardiman, for the crime of armed robbery. A severance was allowed as to Hardiman. The defendant, Jefferson, was tried in the Circuit Court before a jury. The jury returned a verdict of guilty and the trial court sentenced the defendant to a term of not less than ten years nor more than twenty years in the Illinois State Penitentiary.

At the trial one Edward Gauden testified that he was employed at the 677 Tap, located at 677 North Milwaukee Avenue, Chicago, Illinois; that at about 6:30 the evening of July 19, 1963, he saw the defendant behind the bar. The defendant was dressed in gray coveralls, and was coming towards him with a gun in his hand. Gauden testified that he was forced to lie face down on the floor; that the defendant then marched him to the washroom where the co-defendant, Hardiman, revolver in hand, took over; and that he saw three holdup men altogether. The three remained for ten minutes, and took over $400.00 from Gauden. Gauden identified both Jefferson and Hardiman at a lineup held on August 9, 1963. One French Combs, who was a patron at the tavern, corroborated the testimony of Gauden, and at the showup on August 9 he had identified both Jefferson and Hardiman.

Detective Clarence Burke testified for the State that he arrested the defendant, Jefferson; that he was present at the show-up and saw Gauden and Combs identify both the defendant and Hardiman; that on August 9, at Detective Area Four he observed a lineup of

approximately nine men in which he saw Jefferson; that Gauden and Combs viewed the lineup; that the men in the lineup were instructed to give their name, age and address.

When the defendant was indicted the trial court appointed the Public Defender as his attorney. The defendant declined the services of the Public Defender and also refused to have the trial court appoint another attorney from the Chicago Bar Association. He conducted his own defense. The case in this court is presented by an attorney appointed for the defendant.

The defendant first argues that the closing arguments of the Assistant State's Attorney were improper. Assistant State's Attorney Martwick, in his closing argument to the jury, said: "As he [meaning defendant] told Detective Burke - 'I know more law than any lawyers, and I'll beat any charge placed against me.'" On direct examination Detective Burke had so testified.

After reading the entire record and deducing therefrom the general conduct of the defendant in the trial court, the reason for the remark of the Assistant State's Attorney is readily apparent. There is no question that the State's Attorney has the right to reflect unfavorably on the accused, and it has been so held in People v. Halteman, 10 Ill. 2d 74, 139 N.E.2d 286. The remarks made by the State's Attorney, even if prejudicial, would not be reversible error. A further remark of the State's Attorney in the closing argument was:

> "And you have seen Mr. Jefferson standing here talking to you for the last couple of days. He stood in front of you people, and you people looked at him. Is that a face you're going to forget? He has the worst face for an armed robber any man could have."

On defendant's objection the court ordered the statement stricken.

> ". . . statements of counsel based upon the facts, or upon legitimate inferences deduced therefrom, do not transcend the bounds of debate and are not to be discountenanced by the courts. It is proper for the prosecuting attorney to reflect unfavorably on the accused and to denounce his wickedness and even indulge in invective." People v. Halteman, 10 Ill. 2d 74, at 83, 84.

As held in the Halteman case, the remarks here complained of were in "the bounds of propriety and the proper scope of argument and are not so prejudicial to defendant as to require a reversal of the instant judgment." The further remarks of the State's Attorney fall within the same rule.

The defendant argues that the jury selected to try him was not a fair and impartial jury. The State questioned the jurors and two prospective jurors were excused. The defendant did not question the jurors at all, although the court told him he had a right to so to do. He was then asked if the first panel was acceptable and he said, ". . . whatever they want to do. I stand mute. . . ." With reference to the second panel, when the court asked him whether he accepted it, the defendant stated, "Your Honor, I take no part in this trial whatsoever. . . .this is unAmerican, it is unconstitutional, ... It is your privilege, you have power—" The court then held that the second panel was taken without objection.

The trial was held on the last day of jury service. Many of the jurors had acted as jurors in other criminal cases, and counsel contends in this court that the fact that the trial court's permitting jurors who had participated in other criminal cases to sit in the instant case, when no questions were asked the jurors by the defendant, was a strong indication of partiality for the State. The defendant made no objection to the jurors. In People v. Ford, 19 Ill. 2d 466, 168 N.E.2d 33, the defendant was represented by an

attorney of his own choice. In the Supreme Court the defendant objected to the selection of the jurors in the trial court. The court said:

> ". . . We fail, however, to see how defendant was prejudiced by this action. Since the record does not indicate that he exhausted his peremptory challenges, he was as much responsible for picking the first eight jurors as was the People, and the remaining jurors were selected in accordance with his own request. We have frequently stated that a defendant, having failed to use his peremptory challenges, is in no position to complain concerning jury selections. (Siebert v. People, 143 Ill. 571; Wilson v. People, 94 Ill.299; Ochs v. People, 124 Ill.399.)"

In the instant case the defendant had the right to be represented by counsel. He was offered that right and refused it. Even taking the most liberal view of the rights of an indigent defendant in a criminal trial, we do not think the decisions have yet reached the point where the court, under such circumstances, has to act as his attorney. When the defendant decided he did not want an attorney and that he would defend himself, the die was cast. From there on the defendant was responsible for his own defense.

In People v. Solomon, 24 Ill. 2d 586, 182 N.E.2d 736, the court said:

> ". . . While an accused in a criminal case does indeed have the constitutional right to be represented by counsel of his own choosing, it is likewise true that such right may not be employed as a weapon to indefinitely thwart the administration of justice, or to otherwise embarrass the effective prosecution of crime. (People v. Musinski, 22 Ill. 2d 518; People v. Ephraim, 411 Ill.118; United States v. Mitchell, 137 F.2d 1006.)"

We find no error in the selection of the jury.

The defendant further argues that there was highly prejudicial evidence presented against him. Detective Burke testified on direct examination that he had a conversation with the defendant

immediately after the identification, that Jefferson was very excited and upset, and that he told Burke he was a holdup man. The defendant thereupon objected and moved for a mistrial, which motion the court overruled. On cross-examination of Detective Burke, Jefferson asked Burke whether or not he, Jefferson, at the time of the lineup, stepped forward in disobedience of the police order and asked the people, each and every one of them, if they saw anyone in the lineup who had ever done any harm to them, to step forward while he faced them and not to point him out when his back was turned. Burke said that happened after the identification was made. Jefferson then questioned the officer as to whether or not the defendant had said he had committed no specific crime and had merely said "he could identify himself against any crime." Burke answered that he himself did not mention any specific crime at the time he talked to Jefferson but that Jefferson had said that "he knew and that I [Burke] knew that he was a gunman." At this point Jefferson concluded his cross-examination. The defendant on appeal urges that Burke's statement that the defendant had said he was a holdup man was a broad general term implying holdups and other unrelated offenses in general, and consequently, it was prejudicial. This statement made by Burke with reference to the conversation was brought out during his cross-examination and it did not concern a separate, distinct and disconnected crime, nor do we think the statement in the record constituted reversible error. Jefferson objected to the statement and the court replied that he, Jefferson, had asked the question. In this court the defendant argues that the statement should have been stricken. No motion was made by the defendant to strike.

Defendant also objects to the conduct of the trial judge and urges that it prevented the defendant from having a fair and impartial trial. In the opening statement the court told the jury,

"The indictment in this case charges the defendant with the offense of robbery. It is alleged on the 19th day of July, 1963, in Cook County, he by the use of force and while armed with a dangerous weapon took $544 in United States currency from the person and presence of one Edward Gauden." In this court counsel for defendant objects that the court committed prejudicial error in that it did not mention Hardiman as one of the robbers, and states in his brief: "The indictment was read in such a way to lead the venire to believe that defendant acted alone. This was prejudicial." In our opinion, this statement of the trial judge was a proper statement.

While Gauden was on the witness stand the court ordered that Hardiman be brought out of the bull pen into the court room. The State's Attorney said if Hardiman would not come out without force they should forget about bringing him out, and he further stated that Hardiman refused to come out, so they would dispense with him.

On examining the whole record it appears to us that the trial judge was especially considerate of the rights of the defendant. It is common knowledge that to conduct a jury trial where the defendant insists on acting as his own attorney, is difficult. The defendant complains of lack of cooperation. A reading of the record would give the impression that the defendant had sufficient education in the trial of cases* to feel that he was creating an atmosphere of sympathy

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* After the jury brought in its verdict the State introduced evidence in aggravation showing that Jefferson in 1943 was sentenced to the Illinois State Penitentiary 3 to 5 years for armed robbery; in 1952 he was sentenced to Leavenworth, Kansas, U. S. Penitentiary for 2 years; he was sentenced in New York City for 6 months for sale of heroin; and he was at one time convicted in Illinois as an habitual criminal which conviction was subsequently reversed by the Supreme Court of Illinois.

for himself among the jurors.

Finally, the defendant urges that the court denied the defendant process to compel the attendance of witnesses in his behalf. The record does not so show. At the trial of the case, in chambers, outside the presence of the jury, Jefferson said that he would like to make a motion to subpoena witnesses in his behalf. The court said that he would be granted that right, but that the State in the meantime would go ahead with its part of the case. In the presence of the jury Jefferson stated that he objected to any witnesses against him until he could get some witnesses of his own. The court overruled his objection and stated that he would have a chance to have his witnesses heard. After the State had rested, outside the presence of the jury, the court asked Jefferson if he would be ready the next day with his witnesses. Jefferson said that he was in jail and had no way of communication, and further stated, "I would like to have that hundred and fifty--that list that the police officers used to call all of these other witnesses down to the police station. I would like to have it to impeach the testimony of these other witnesses." The court said it would have to overrule his motion on that and stated that the court does not go out and find the defendant's witnesses for him, that he would have to get his own witnesses. The court further said that if Jefferson wanted an extension of the trial for two days he would be happy to give it to him. The court said the clerk had been asked to aid Jefferson in preparing his subpoenas, and asked Jefferson whether or not he had had any subpoenas prepared. Jefferson said he could not prepare anything because he was incarcerated. Later the court said it understood that Jefferson had given the clerk names of people whom he wished to subpoena, and Jefferson replied

that was correct. The clerk said there were at least three names submitted: Lawrence Wiseman, Detective Breckenridge, Officer Charles, and Officer Singleton. Jefferson then said he did not agree with that, and the clerk said they would bring the list of the people who appeared at the showup. The court said that when Jefferson got the list he could pick out a few names that he wished to subpoena, and asked Jefferson what he expected to prove by that. Jefferson replied that he could prove that he faced them and begged them to identify him if he had ever done anything to them; and that all of the witnesses were connected in the indictment. The court then said it would not permit Jefferson to subpoena one hundred and fifty people in there without some showing as to what they could prove.

In the trial of the case Detective Burke testified as to how a police lineup was held and described the lineup in the instant case held on August 9, 1963. He said there were approximately one hundred and fifty people viewing the lineup, of which number only two--Gauden and Combs--were connected with the case in question. He said that in the lineup there were approximately nine men, including Jefferson and Hardiman, and that they were instructed by Lt. Simms to give their names, ages and addresses, after which they were instructed to face the wall. The persons viewing the lineup were instructed to make an identification, if possible, to any specific offense that may have affected them. At that time Gauden and Combs identified Jefferson and Hardiman. On cross-examination by Jefferson, Burke stated that the persons in the lineup who were being viewed were asked to turn left, right, and about face. Jefferson asked Burke why a group of people could not be permitted to identify a person while he faced them, and Burke said the reason was for the protection of the persons who identified the suspects. Burke also testified that Jefferson, after the identification was made, stepped forward and asked the viewers not to

point him out when his back was turned but to point him out while he faced them; that Jefferson was then jumping up and down, making physical gestures, and that a police officer attempted to quiet him. The method used in conducting the police lineup seems to be reasonable and proper.

Jefferson did not take the stand himself, nor did he call any witnesses, although he was given the opportunity by the court. The Public Defender who had been appointed, but whose services were refused by Jefferson, assisted in preparing the instructions, and no objection is made in this court with reference to any error in the instructions.

From the record it appears that no question could be raised as to the sufficiency of the identification of Thomas Jefferson as the man who participated in the robbery of the tavern. He received every consideration from the court. He had a fair trial, and the verdict of the jury finding him guilty was substantiated by the evidence.

The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

DRUCKER, P.J., and ENGLISH, J., concur.

Publish abstract only.